TRINITY LUTHERAN CHURCH OF COLUMBIA, INC. V. COMER: NO DISCRIMINATION BASED ON RELIGIOUS IDENTITY

In Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Supreme Court held that a State's policy of prohibiting a church's participation in a government benefit program, simply because it was a church, violated the Free Exercise Clause. This Comment argues that this holding is consistent with the history and precedent reinforcing government neutrality toward religion. The Religion Clauses, instead, prohibit government endorsement of a particular religious message and prohibit government discrimination based on religious identity. Furthermore, this Comment argues that future* Trinity *cases will hinge on how the reviewing court (1) defines the government benefit at issue and (2) determines if the funding at issue amounts to support of an essentially religious endeavor. This analysis is particularly important as religious groups continue to develop social enterprises and provide public services.*

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I. INTRODUCTION

In September 2017, President Trump tweeted: "Churches in Texas should be entitled to reimbursement from FEMA Relief Funds for helping victims of Hurricane Harvey (just like others)."[1] This (relatively) uncontroversial tweet[2] referred to a complaint, filed in federal district court, in which three churches alleged that the Federal Emergency Management Agency ("FEMA") "categorically exclude[d] houses of worship from equal access to disaster-relief grants because of their religious status."[3] These churches assisted FEMA in the wake of Hurricane Harvey, offering their facilities as homeless shelters and supply warehouses,[4] but FEMA's policy prohibited them from receiving Public Assistance Program grants to clean up their property and repair their facilities damaged by the storm.[5]

To allege that FEMA's policy violated the Free Exercise Clause of the First Amendment,[6] the churches relied on *Trinity Lutheran Church of Columbia, Inc. v. Comer*.[7] The Religion Clauses of the First Amendment[8] state: "Congress shall make no law respecting an establishment of religion" nor shall it "prohibit[] the free exercise thereof."[9] In *Trinity*, seven justices of the Supreme Court held that Missouri's policy of prohibiting a church's participation in a state-sponsored playground resurfacing program, "solely because it [was] a church," violated the Free Exercise Clause.[10] Despite receiving support from a seven-justice majority,[11] according to

1. Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 8, 2017, 5:56 PM), https://twitter.com/realDonaldTrump/status/906320446882271232.

2. *See, e.g.*, Jasmine C. Lee & Kevin Quealy, *The 487 People, Places and Things Donald Trump Has Insulted on Twitter*, N.Y. TIMES (July 10, 2018), https://www.nytimes.com/interactive/2016/01/28/upshot/donald-trump-twitter-insults.html.

3. Complaint at 1, Harvest Family Church v. FEMA, No. 4:17-cv-02662, 2017 WL 3887451 (S.D. Tex. Sep. 4, 2017) [hereinafter Complaint].

4. *Id.* at 2.

5. *Id.* at 2, 5; *see* Emma Green, *Will Trump Direct FEMA to Fund Churches Hit by Hurricanes?*, ATLANTIC (Sept. 11, 2017), https://www.theatlantic.com/politics/archive/2017/09/hurricane-harvey-faith-based-organizations-fema-trump/539346/ ("Hurricane Harvey blew the steeple off of Rockport First Assembly of God . . . . Harvest Family Church . . . got covered in a layer of mud and silt. Three feet of water filled the sanctuary of Hi-Way Tabernacle . . . .").

6. Complaint, *supra* note 3, at 1.

7. 137 S. Ct. 2012 (2017).

8. The Religion Clauses are applied to the States through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

9. U.S. CONST. amend. I.

10. *Trinity*, 137 S. Ct. at 2025. In this Comment, unless quoting or incorporating language from another source, "*Trinity*" refers to the case and the Court's decision and "Trinity Lutheran" refers to the church that was the petitioner in *Trinity*.

11. *See* Richard W. Garnett & Jackson C. Blais, *Religious Freedom and Recycled Tires: The Meaning and Implications of* Trinity Lutheran, 2017 CATO

Trinity's critics, the decision destroyed a "wall of separation between church and State"[12] and buried the Constitution in the debris.[13] The "decision slights both our precedents and our history," Justice Sotomayor exclaimed at the beginning of her *Trinity* dissent, an opinion that only gained support from Justice Ginsburg.[14] It "leads us . . . to a place where separation of church and state is a constitutional slogan, not a constitutional commitment," Justice Sotomayor concluded.[15]

This Comment argues that *Trinity* is consistent with history and precedent concerning government benefit programs. The Religion Clauses prohibit government endorsement of a particular religious message—specifically, public support of an essentially religious endeavor—*and* prohibit government discrimination on the basis of religious identity.[16]

Part II discusses briefly the history of the Religion Clauses and surveys the Court's precedent concerning government benefit programs. Part III outlines the development of *Trinity*, shows how the Court distinguished *Trinity* from *Locke v. Davey*,[17] a separate decision concerning a public benefit, and argues that this distinction reinforces *Trinity's* consistency with history and precedent. Part IV reviews two recent federal court decisions concerning government benefit programs (1) to highlight the complexity of free exercise cases and (2) to show *Trinity's* reasonable position within the broader judicial landscape. Part V returns to the complaint filed against FEMA and applies *Trinity* to an interesting and timely set of facts.

SUP. CT. REV. 105, 121 (2017) (observing how remarkable this result is today, especially for a case "at least adjacent to the culture war arena").

12. *See* Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting Thomas Jefferson's opinion that the Religion Clauses were meant to build a wall between church and State).

13. *See, e.g.*, Edward Correia, Trinity Lutheran Church v. Comer*: An Unfortunate New Anti-Discrimination Principle*, 18 RUTGERS J. L. & RELIGION 280, 280 (arguing that "the holding of the case may fundamentally change church-state relations in the United States, and not for the better"); Erwin Chemerinsky, *Symposium: The Crumbling Wall Separating Church and State*, SCOTUSBLOG (June 27, 2017, 10:18 AM), http://www.scotusblog.com/2017/06/symposium-crumbling-wall-separating-church-state/ (stating that, as a result of *Trinity*, the "noble and essential idea of a wall separating church and state is left in disarray, if not shambles").

14. *Trinity*, 137 S. Ct. at 2027 (Sotomayor, J., dissenting).

15. *Id.* at 2041.

16. *See infra* Subpart II.B, Part III.

17. 540 U.S. 712 (2004).

II. HISTORY AND PRECEDENT

A. Founders' Concerns

The Court interprets the Religion Clauses "in light of their history."[18] While contemporary antiestablishment arguments tend to focus on whether a governmental action improperly advances religion, historical arguments emphasize the importance of "freeing religious institutions and the religious life of the people from government control."[19] In other words, today, Americans seem to worry more about whether religion improperly influences government action, but the Founders worried more about whether government action improperly controlled religion. For example, during the American colonial era, the Church of England, authorized by Parliament, extorted English citizens by enforcing taxes and fines used to support the established church.[20] Although many colonists journeyed to escape this tyranny, some American colonies supported established churches even after the American Revolution.[21] These colonists, regardless of their religious identity or lack of it, "were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters."[22] "It was these feelings which found expression in the First Amendment,"[23] and the Founders wanted "to prohibit the new government from filling ecclesiastical offices, setting up a national church, imposing forced tithes, or compelling dissenters to worship in a particular way or support a particular church."[24]

Historical arguments about the Founders' understanding of the Religion Clauses, regardless of those arguments' conclusions, typically rely on *Memorial and Remonstrance Against Religious Assessments*,[25] written by James Madison, who was largely regarded as the "Father of the Constitution."[26] In this famous writing, which precedes the Constitution, Madison opposed a proposed Virginia law

18. Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J. L. & PUB. POL'Y 821, 827 (2012).

19. *Id.* at 828.

20. Ark Encounter, LLC v. Parkinson, 152 F. Supp. 3d 880, 895–96 (E.D. Ky. 2016).

21. *Id.* at 896.

22. Everson v. Bd. of Educ., 330 U.S. 1, 10 (1947).

23. *Id.* at 11.

24. *Ark Encounter*, 152 F. Supp. 3d at 896.

25. JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* II WRITINGS OF JAMES MADISON 183 (Gaillard Hunt ed. 1783–87).

26. *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2033–34 (2017) (Sotomayor, J., dissenting); *Everson*, 330 U.S. at 11–12; Am. Atheists v. City of Detroit Downtown Dev. Auth., 567 F.3d 278, 297 (2009); *Ark Encounter*, 152 F. Supp. 3d at 896; McConnell, *supra* note 18, at 830.

that would have raised funds for churches to support the salaries of ministers and the construction of sanctuaries.[27] The "very purpose" of this tax, known as a "religious assessment," "was to promote religion, and to use the coercive taxing-and-spending power of the State in doing so."[28] In opposition to this assessment, Madison advocated for freedom from government coercion over religion,[29] adding that "cruel persecutions were the inevitable result of government-established religions."[30] The Virginia legislature ultimately rejected the assessment.[31] Thus, by adopting the Establishment Clause, the Founders rejected the English system of government control over religious beliefs, practices, and worship.[32]

Religious assessments, taxes raised for the sole purpose of supporting an established church, are not equivalent to the government benefit at issue in *Trinity*: "religiously neutral funding of some broader category of private activity—medical care, social services, education . . . playground surfaces."[33] Furthermore, Madison's understanding of religious freedom does not endorse a "bright-line rule banning any public assistance" for religious purposes.[34] Madison expected government to be *neutral* toward religion instead of hostile toward or advancing of it.[35] The Court echoed this belief in *Everson v. Board of Education*,[36] where the Court explained that the Religion Clauses require "the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[37] Thus, while Madison's concern makes it clear that non-neutral taxes—having the express purpose and only effect of advancing religion—are undeniably unconstitutional,[38] his concern does not resolve, or necessarily even address, whether a neutral government benefit program that does not have the primary purpose or effect of

27. *Everson*, 330 U.S. at 11–12 (citing MADISON, *supra* note 25, at 183–91); *Am. Atheists*, 567 F.3d at 297 (same).

28. *Am. Atheists*, 567 F.3d at 297.

29. *Ark Encounter*, 152 F. Supp. 3d at 896.

30. *Everson*, 330 U.S. at 12 (citing MADISON, *supra* note 25, at 188).

31. *Id.*

32. *Id.* Madison's understanding of religious freedom, as it is preserved in the Constitution, is clearly articulated in his famous writing about the religious assessment proposal. MADISON, *supra* note 25, at 184 ("The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right.").

33. Douglas Laycock, *Churches, Playgrounds, Government Dollars – And Schools*, 131 HARV. L. REV. 133, 143 (2017).

34. *Am. Atheists*, 567 F.3d at 297.

35. *Id.*

36. 330 U.S. 1 (1947).

37. *Id.* at 18.

38. *See Am. Atheists*, 567 F.3d at 297 (citing MADISON, *supra* note 25, at 183); Laycock, *supra* note 33, at 143 ("That settlement has held; no one is proposing that kind of funding today.").

advancing religion is unconstitutional.[39] Unlike today, during the American colonial era, the government did not fund private activities engaged in by churches *and* secular organizations, such as public safety programs, medical care, and education.[40] Thus, the funding issue in *Trinity*, "and in every other modern funding case, is fundamentally different from the issue at the Founding."[41]

In light of this historical difference, instead of wondering whether the Founders would have opposed a neutral government spending program that extends a benefit to churches, "[t]he better question is to imagine" whether the Founders would have endorsed a neutral government spending program that extends a benefit to everyone except to "a group devoted to worshiping a deity" simply because the group has a religious identity?[42] Madison might have been suspicious of this non-neutral government treatment of religion.[43] As discussed below, Court decisions endorse this assumption.

B. No Discrimination Based on Religious Identity

Throughout its history, the Court has opposed discrimination on the basis of religious identity. In *Bradfield v. Roberts*,[44] decided in 1899, the Court held that Congress' incorporation of a hospital operated by members of the Roman Catholic Church did not violate the Establishment Clause.[45] The Court reasoned that the religious or nonreligious identities of the people who composed the chartered hospital are "of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into."[46] In other words, the Court held that the Establishment Clause does not prevent government sponsorship of "the opening and keeping [of] a hospital . . . for the care of . . . sick and invalid persons" just because people claiming a religious identity operate the hospital.[47]

Likewise, in *Everson*, the Court upheld a New Jersey statute that allowed school districts to reimburse parents for the public transportation costs of sending their children to school even if their children attended a parochial school.[48] The Court explained that while the Establishment Clause prohibited New Jersey from contributing "tax-raised funds to the support of an institution which teaches the tenets and faith of any church," the Free Exercise Clause

39. *See Am. Atheists*, 567 F.3d at 297 ("Reliance on . . . [Madison's] *Memorial* here gives historical analogy a bad name.").
40. Laycock, *supra* note 33, at 143–44.
41. *Id.* at 142.
42. *Am. Atheists*, 567 F.3d at 197.
43. Laycock, *supra* note 33, at 144.
44. 175 U.S. 291 (1899).
45. *Id.* at 297–98.
46. *Id.* at 298.
47. *Id.* at 299.
48. Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947).

"commands that New Jersey cannot hamper its citizens in the free exercise of their own religion."[49] The Court continued:

> Consequently, [New Jersey] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief.[50]

Thus, the Court held that the First Amendment did not prohibit the State from "spending [tax-raised] funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools."[51] In other words, although the Religion Clauses prohibit a state from endorsing a particular religious message, the Clauses also prohibit a state from withholding a public benefit on the basis of a person or group's religious identity.

The Court reiterated these principles in *Sherbert v. Verner*.[52] In *Sherbert*, a woman lost her job "because she would not work on Saturday, the Sabbath Day of her faith."[53] In light of her faith commitment, she could not find another job, so she filed for unemployment compensation benefits.[54] But South Carolina's Employment Security Commission rejected her claim, arguing that she did not have "good cause" for lacking employment.[55] Relying on its reasoning from *Everson*, the Court held that South Carolina's denial of unemployment benefits violated the woman's free exercise rights.[56]

To reach this holding, the Court explained that the Free Exercise Clause "stands tightly closed against any governmental regulation of religious beliefs as such."[57] Specifically, the Clause prohibits the government from using its taxing power to compel individuals to

49. *Id.* at 16.
50. *Id.*
51. *Id.* at 17.
52. 374 U.S. 398 (1963).
53. *Id.* at 399.
54. *Id.* at 399–400.
55. *Id.* at 401.
56. *See id.* at 410 ("Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest.").
57. *Id.* at 402.

affirm or deny particular religious beliefs.[58] The Court found that the State's denial of benefits forced the woman "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[59] The Court compared the imposition of this unfair choice to a fee for worshiping on Saturdays.[60]

Later, in *McDaniel v. Paty*,[61] the Court relied on *Sherbert* to strike down a Tennessee law that prohibited a minister, because he was a minister, from serving as a delegate to the State's constitutional convention.[62] In his concurrence, Justice Brennan reasoned that "because the challenged provision requires appellant to purchase his right to engage in the ministry by sacrificing his candidacy [as a delegate to the state convention,] it impairs the free exercise of his religion."[63] The law imposed an unfair choice upon the minister by forcing him to choose between his religious identity and forfeiting his right to participate in a state convention, on the one hand, and abandoning his religious identity in order to participate in a state convention, on the other hand.[64]

The Court reiterated the unconstitutionality of this unfair treatment in *Church of Lukumi Babalu Aye v. City of Hialeah*.[65] In *Lukumi*, a city criminalized animal sacrifices for the *sole* purpose of barring a Santerian group's religious practice.[66] The Court reasoned that the Free Exercise Clause applies when a law "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons,"[67] and it "protects against governmental hostility which is masked as well as overt."[68] In this case, the hostility was overt, even though the law was facially

58. *Id.*
59. *Id.* at 404.
60. *Id.*
61. 435 U.S. 618 (1978).
62. *Id.* at 626.
63. *Id.* at 634 (Brennan, J., concurring). The plurality opinion, written by Chief Justice Burger, stated that the Free Exercise Clause absolutely prohibits discrimination on the basis of belief, but found that the law at issue discriminated on the basis of ministerial status, "defined in terms of conduct and activity." *Id.* at 627 (Burger, J., plurality). The plurality still held that the law did not survive strict scrutiny because the state's disestablishment concerns were not persuasive. *Id.* at 629. In his concurrence, Justice Brennan rejected Chief Justice Burger's distinction between discrimination on the basis of religious belief and discrimination on the basis of ministerial status, arguing that "religious belief surely does not cease to enjoy the protection of the First Amendment when held with such depth of sincerity as to impel one to join the ministry." *Id.* at 631 (Brennan, J., concurring).
64. *Id.* at 633.
65. 508 U.S. 520 (1993).
66. *Id.* at 545.
67. *Id.* at 532.
68. *Id.* at 534.

neutral.[69] Thus, the Court struck down the ordinance, holding that it failed to withstand "the most rigorous of scrutiny."[70]

C. Gratuitous Public Benefits

In *Sherbert*, South Carolina justified its discrimination because unemployment benefits are not a "'right' but merely a 'privilege.'"[71] The Court rejected this argument: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[72] In other words, most public benefits are privileges, and this does not free the government to discriminate on the basis of religious identity.

Likewise, the Court rejected "the recurrent argument that all aid [to a religious institution] is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends."[73] Thus, although courts recognize a distinction between a public benefit that a church could convert from a secular to a religious purpose and one that a church could not so convert,[74] the government cannot withhold a public benefit from a church because it would save a church money to spend on its religious purposes.[75] This marginal concern, without more, does not qualify as a compelling state interest.[76]

III. RELIGIOUS IDENTITY IN *TRINITY*

A. From Coarse Pea Gravel to the Supreme Court

In *Trinity*, the Missouri Department of Natural Resources ("Department") ran Missouri's Scrap Tire Program ("Program").[77] To "reduce the number of used tires destined for landfills and dump sites," the Program offered "reimbursement grants to qualifying nonprofit organizations that purchase[d] playground surfaces made from recycled tires."[78] The Department awarded these grants "on a competitive basis" using scoring criteria "such as the poverty level of the population in the surrounding area and the applicant's plan to promote recycling."[79] While the Department awarded grants to "help public and private schools, nonprofit daycare centers, and other

69. *Id.* at 534–35.
70. *Id.* at 546.
71. Sherbert v. Verner, 374 U.S. 398, 404 (1963).
72. *Id.*
73. Hunt v. McNair, 413 U.S. 734, 743 (1973).
74. *See infra* text accompanying note 160.
75. *See Hunt*, 413 U.S. at 743.
76. *Id.*
77. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017).
78. *Id.*
79. *Id.*

nonprofit entities,"[80] it also enforced a "strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity."[81] The Department believed the Establishment Clause component of Missouri's Constitution required this discrimination.[82]

In 1985, a nonprofit preschool and daycare organization merged with Trinity Lutheran Church to form the Trinity Lutheran Church Child Learning Center ("Center").[83] The Center "admits students of any religion."[84] In 2012, the Center applied to the Program for financial help; it wanted to replace the "coarse pea gravel" covering its playground with a "pour-in-place rubber surface."[85] Based on the Program's scoring criteria, the Center's application ranked fifth out of forty-four applicants.[86] But based on the Program's strict policy disqualifying religious entities, the Center "was deemed categorically ineligible to receive a grant."[87] The Center filed suit against the Department, claiming that the Program's policy violated the Free Exercise Clause.[88]

B. Introducing Locke v. Davey

The federal district court dismissed the Center's case, and the Court of Appeals for the Eighth Circuit affirmed the dismissal.[89] Both courts found that *Locke v. Davey* controlled.[90] In *Locke*, Washington State sponsored a scholarship program "to assist academically gifted students with postsecondary education expenses," but the program prohibited use of the scholarship to pursue a "degree in devotional

80. *Id.*
81. *Id.*
82. *Id.* The relevant part of Missouri's Constitution states:

> "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

Id. (quoting MO. CONST. art. I, § 7). This type of state constitutional provision, adopted at some point by at least forty states, is known as a "Blaine provision." Laycock, *supra* note 33, at 145. A thorough analysis of the history and purpose of Blaine provisions is beyond the scope of this Comment. For a discussion of the anti-Catholicism origins of Blaine provisions, see id. at 166–68.
83. *Trinity*, 137 S. Ct. at 2017.
84. *Id.*
85. *Id.*
86. *Id.* at 2018.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 2018–19.

theology."[91] Washington argued that the Establishment Clause component of its state constitution required this discrimination.[92]

Washington awarded a scholarship to Joshua Davey.[93] But Washington prohibited Davey from using his scholarship to pursue a "double major in pastoral ministries and business management/administration" at Northwest College, a "private, Christian college affiliated with the Assemblies of God denomination."[94] The problem was not that Davey wanted to attend Northwest College.[95] The problem was that Davey wanted to use his scholarship to pursue a degree in devotional theology.[96]

Davey claimed this distinction infringed his free exercise rights.[97] The Supreme Court disagreed.[98] Acknowledging that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause,"[99] the Court found that although Davey's particular use would not necessarily violate the Establishment Clause, Washington could still prohibit his use without violating his free exercise rights.[100]

Furthermore, the Court rejected Davey's argument that Washington's discrimination compared to the overt hostility in *Lukumi*.[101] "In the present case," the Court observed, "the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposed neither criminal nor civil sanctions on any type of religious service or rite."[102] In fact, the Court described Washington's program as going "a long way toward including religion in its benefits,"[103] since recipients could use their scholarships "to attend pervasively religious schools."[104] Likewise, the Court rejected comparisons to *McDaniel*, explaining that Washington's policy "does not require students to choose between their religious beliefs and receiving a government benefit."[105]

"Since the founding of our country," the Court explained, "there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an

91. Locke v. Davey, 540 U.S. 712, 715 (2004).
92. *Id.* at 716.
93. *Id.* at 717.
94. *Id.*
95. *See id.* (stating that Northwest College was an "eligible institution" under Washington's scholarship program).
96. *Id.*
97. *Id.* at 718.
98. *Id.* at 715.
99. *Id.* at 718–19.
100. *Id.* at 725.
101. *Id.* at 720.
102. *Id.*
103. *Id.* at 724.
104. *Id.*
105. *Id.* at 720–21.

'established' religion."[106] The Court described "[t]raining someone to lead a congregation" as "an essentially religious endeavor."[107] Therefore, the Court concluded that Washington's discrimination between "religious education for the ministry" and "education for other callings" was "a product of these [historic, antiestablishment] views, not evidence of hostility toward religion."[108]

C. The Difference Between Training Ministers and Resurfacing Playgrounds

In *Trinity*, the lower courts dismissed the Center's case against Missouri, finding no distinction between the Center's claim and Davey's claim in *Locke*.[109]

But a seven-justice majority of the Supreme Court disagreed and distinguished the cases.[110] First, the Court compared Missouri's discrimination to the religious discrimination in the "*Lukumi* line of cases."[111] For example, the Court found that the Program's policy "puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution."[112] Furthermore, the Court found that the policy imposed "special disabilities on the basis of religious views or religious status."[113] The *Trinity* Court observed that the *Locke* Court never found these discriminatory problems concerning Washington's scholarship program.[114]

Second, the Court distinguished the cases by differentiating between the restrictions the respective states imposed.[115] "Davey [in *Locke*] was not denied a scholarship because of who he was," the Court explained.[116] "[Davey] was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church."[117] In other words, Missouri discriminated against the Center based on its religious identity.

106. *Id.* at 722.
107. *Id.* at 721.
108. *Id.*
109. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2018 (2017). After the parties submitted briefs to the Court, *Trinity* involved a unique turn of events. Missouri elected a new governor who instructed the Department to permit churches to compete for these grants. Laycock, *supra* note 33, at 136. Thus, when the Court heard oral arguments, "the plaintiffs and the state's leadership" appeared to be "on the same side." *Id.*
110. *Trinity*, 137 S. Ct. at 2022–23.
111. *Id.* at 2023 (quoting *Locke*, 540 U.S. at 720).
112. *Id.* at 2021–22.
113. *Id.* at 2021 (quoting Emp't Div. v. Smith, 494 U.S. 872, 877 (1990)).
114. *Id.* at 2023.
115. *Id.*
116. *Id.*
117. *Id. But see* Laycock, *supra* note 33, at 159–60 (critiquing *Locke* and this distinction from *Trinity*).

Third, the Court distinguished the cases by differentiating between the state interests raised in each case.[118] "[D]enying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order,'" the Court explained.[119] The Court recognized that Washington's policy in *Locke* "was in keeping with the State's antiestablishment interest in not using taxpayer funds to pay for the training of clergy."[120] In other words, Washington did not violate Davey's free exercise rights because Washington demonstrated a compelling state interest—legitimate concern for the unconstitutional promotion of a particular religious message by funding an "essentially religious endeavor."[121] However, in *Trinity*, the Court found that (1) "nothing of the sort can be said about a program to use recycled tires to resurface playgrounds,"[122] and (2) "Missouri's policy preference for skating as far as possible from religious establishment concerns," when a preference and nothing more is Missouri's only justification, does not qualify as a compelling state interest.[123] Thus, the Court held that "exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand."[124]

Thus, concerning government benefit programs, the Religion Clauses prohibit government endorsement of a particular religious message—specifically, public support of an essentially religious endeavor—*and* prohibit government discrimination on the basis of religious identity, unless the government demonstrates a compelling state interest. The preference for avoiding a potential antiestablishment concern, without more, and especially when a true antiestablishment problem does not likely exist, does not qualify as a compelling state interest.

D. Is Trinity *Limited to Playground Resurfacing?*

Writing for the majority, Chief Justice Roberts inserted a footnote: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."[125] Despite this attempt to limit the holding, it seems unlikely that *Trinity* can be contained so easily. For example, initial commentary on the decision focused on how it will affect school voucher

118. *Trinity*, 137 S. Ct. at 2023.
119. *Id.* at 2019 (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978)).
120. *Id.* at 2023.
121. *Id.* (quoting Locke v. Davey, 540 U.S. 712, 721 (2004)).
122. *Id.*
123. *Id.* at 2024.
124. *Id.* at 2025.
125. *Id.* at 2024 n.3.

programs.[126] It seems doubtful that a court would limit *Trinity* to *only* playground resurfacing cases.[127]

In his concurrence, Justice Breyer emphasized the "particular nature of the 'public benefit' here at issue" to support Chief Justice Roberts' limiting footnote.[128] But he also recognized that "[p]ublic benefits come in many shapes and sizes" and equated the general welfare legislation at issue in *Everson* with *Trinity's* "general program designed to secure or to improve the health and safety of children."[129]

Justice Breyer's clarification reinforces at least two important observations about the difference between (1) training ministers and (2) resurfacing playgrounds. First, only the former is an essentially religious endeavor that promotes a particular religious message.[130] In contrast, general programs designed to improve public health and safety are not essentially religious endeavors.[131] Second, a person or group claiming a religious identity, even if compelled by that religious identity, may undertake endeavors that are not essentially religious.[132] The outcome in *Bradfield* reinforces this conclusion—the religious or nonreligious identities of the people who composed the chartered hospital "is of not the slightest consequence with reference to the law of its incorporation."[133]

Thus, even if the Center's religious identity compelled it to operate a nonprofit preschool and daycare, the resurfacing of the Center's playground did not involve the promotion of a particular religious message. Whether the activity at issue in *Trinity* is defined narrowly—operating a playground—or broadly—operating a preschool and daycare for children of any religion—neither is an

126. *See, e.g.*, Garnett & Blais, *supra* note 11, at 123 (stating that surrounding *Trinity* "the proverbial elephant in the room has been the implications of a win by the church for school-choice programs and education funding more generally"); Laycock, *supra* note 33, at 134 ("The bigger issue is whether *Trinity Lutheran* will apply to school choice programs."); Valerie Strauss, *Will the Supreme Court's* Trinity *Decision Lead to the Spread of School Voucher Programs?*, WASH. POST (June 22, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/06/26/will-the-supreme-courts-trinity-decision-lead-to-the-spread-of-school-voucher-programs/?utm_term=.6394e4ae6e4d (stating that "supporters of school voucher programs are already cheering the decision as boding well for the expansion of school choice").

127. *See, e.g.*, *Trinity*, 137 S. Ct. at 2026 (Gorsuch, J., concurring) (rejecting Chief Justice Roberts's limiting footnote because "the general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else"); Correia, *supra* note 13, at 291 (explaining that "it is hard to see how the opinion can be limited in the way the footnote suggests in light of the sweeping statements in the opinion").

128. *Trinity*, 137 S. Ct. at 2026 (Breyer, J., concurring).

129. *Id.* at 2027.

130. *See supra* Subpart III.B.

131. *See supra* Subpart III.C.

132. *See* Bradfield v. Roberts, 175 U.S. 291, 298–99 (1899).

133. *Id.* at 298.

essentially religious endeavor. Therefore, it seems reasonable to assume that *Trinity* applies to a range of public benefits, especially benefits concerning public health and safety, so long as those benefits do not support an essentially religious endeavor.

E. Hypotheticals

Assume a state adopts an employment stimulus plan to revitalize its economy. As part of this plan, the state offers grants to in-state organizations, including private businesses and nonprofit organizations, for the purpose of improving employment. The applicant agrees to hire a new employee, and the state provides a grant to subsidize the new employee's salary. Several conditions apply, but the state offers these grants on a competitive basis. While houses of worship and religious organizations can participate, the state prohibits any applicant from using the subsidy to hire someone employed as a minister.

If a house of worship applied but was denied funds because it wanted to hire a minister, then this scenario would be like *Locke*.[134] According to *Trinity*, the house of worship would be denied funding not because of what it is but because of what it proposed to do—use the funds to hire a minister.[135] Legitimate concern about government endorsement of an essentially religious endeavor—subsidizing a minister's salary—would justify the state's discrimination. In this scenario, the house of worship would not be discriminated against on the basis of its religious identity; it could have used the money to hire a nonministerial employee, such as an office administrator or a facilities manager.

However, if the state categorically prohibited a house of worship from applying for a grant, then the state would discriminate on the basis of religious identity. The house of worship would be compelled to choose between preserving its religious identity and foregoing a public benefit, on the one hand, and forfeiting its religious identity to

134. *See generally* Locke v. Davey, 540 U.S. 712 (2004).

135. This hypothetical is imperfect but attempts to illustrate *Trinity* and its potential implications. Among other issues, including that this type of benefit might be beyond Justice Breyer's public health and safety limitation, the ministerial exception doctrine could undermine this hypothetical program if such a program created governmental interference with a house of worship's selection of its minister. *See generally* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–89 (2012) ("We agree that there is such a ministerial exception. . . . Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so . . . interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. . . . [The state's imposition of an unwanted minister] infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.").

receive a subsidy, on the other hand.[136] The state's preference for avoiding a potential antiestablishment concern, without more, and especially when a true antiestablishment problem does not likely exist, would not justify the state's express discrimination against the house of worship on the basis of its religious identity.

Further assume that the house of worship owns and operates a separate thrift store and wants to use a grant to hire a new sales assistant. Or assume that the house of worship operates a coffeehouse and wants to use a grant to hire a barista. Such church-sponsored enterprises are a growing trend as churches develop creative forms of social engagement and sources of revenue.[137] Could the state deny these requests on the basis of what the house of worship proposes to do with the funds? This outcome might hinge on if the sales assistant or the barista is a "minister." In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[138] the Court refused "to adopt a rigid formula for deciding when an employee qualifies as a minister."[139] But the Court recognized that an employee could be a minister based on her formal title and "the important religious functions she performed."[140] Therefore, this outcome might more narrowly hinge on if the sales assistant or the barista performs important religious functions. In other words, this outcome might more narrowly hinge on if supporting such an employee amounts to support of an essentially religious endeavor.

Again, further assume that instead of adopting an employment stimulus plan, the state initiates a property revitalization program to clean up old buildings and attract new businesses to certain areas. Could the state prohibit a house of worship from participating in its program if a house of worship wanted to use the funds to landscape its property and renovate all or part of its facility? Because of the potential impact on public health and safety, this hypothetical program is likely more in line with what is permissible under *Trinity* than the hypothetical employment stimulus plan.[141] Part IV discusses how a court might resolve similar issues under *Trinity*.

IV. THE BROADER JUDICIAL LANDSCAPE

Two recent federal court decisions concerning government benefit programs illustrate how courts address complex free exercise cases and demonstrate reasoning that foreshadows *Trinity*'s holding.

136. *See* Sherbert v. Verner, 347 U.S. 398, 404 (1963).

137. *See* Lynn Gosnell, *The Coffeehouse Church*, FAITH & LEADERSHIP (Mar. 1, 2010), https://www.faithandleadership.com/coffeehouse-church; Joshua Lurie, *LA Church Cafes Provide a Fresh Blend of Jesus, Community, and Coffee*, EATER LA (Mar. 24, 2017, 10:00 AM), https://la.eater.com/2017/3/24/15015852/coffee-jesus-collaborate-community-charity-church-cafes.

138. 565 U.S. 171 (2012).

139. *Id.* at 190.

140. *Id.* at 192.

141. *See supra* Subpart III.D.

A. Renovating Downtown Buildings

In *American Atheists v. City of Detroit Downtown Development Authority*,[142] the Court of Appeals for the Sixth Circuit held that Detroit's inclusion of churches in a downtown revitalization program did not violate the Establishment Clause.[143] In *American Atheists*, Detroit's Downtown Development Authority ("Authority") initiated a program to "enhance the visual appearance of the downtown area."[144] The program granted property owners within a certain area reimbursement for renovations to their building facades and parking lots.[145] Anyone who owned or leased property within the area could apply.[146] The Authority approved nine projects involving property owned by three downtown churches, which amounted to less than seven percent of the program's total reimbursements.[147] American Atheists, Inc., a group devoted to pursuing antiestablishment concerns, filed suit against the Authority alleging that awarding grants to the churches was an unconstitutional use of tax revenue.[148]

Relying on Supreme Court precedent, the Sixth Circuit explained that "the Establishment Clause requires government to enact laws that are *neutral* as to religion, do not have the *purpose* of advancing religion and do not have the *primary effect* of advancing religion."[149] Thus, the Sixth Circuit scrutinized the Authority's program under these rules.[150]

First, the Sixth Circuit held that the program was neutral as to religion because it "makes grants available to a wide spectrum of religious, nonreligious and areligious groups alike" and "employs neutral, secular criteria" to award reimbursement grants.[151] "That the program includes, rather than excludes, several churches among its many other recipients helps 'ensure neutrality, not threaten it,'" the Sixth Circuit observed.[152]

Second, the Sixth Circuit held that the program did not have the purpose of advancing religion because there was no evidence that this was the Authority's "overt or masked" intention when it chose to offer the reimbursement grants.[153] "What the record shows instead," the

142. 567 F.3d 278 (6th Cir. 2009).
143. *Id.* at 282.
144. *Id.*
145. *Id.*
146. *Id.* at 283.
147. *Id.* at 283–84. The program approved eighty-two other projects, "including grants to a music hall, a bank, a hotel, an opera house, a theater and an apartment building." *Id.* at 284.
148. *Id.*
149. *Id.* at 288–89.
150. *Id.* at 289–94.
151. *Id.* at 290.
152. *Id.* (quoting Good News Club v. Milford Cent. Sch., 533 U.S. 98, 114 (2001)).
153. *Id.*

Sixth Circuit found, "is that the program was designed to revitalize the downtown area across the board by giving all of its buildings (and parking lots) a facelift."[154] In light of the "evenhanded language of the program," its religion-neutral purposes, and the "wide array of entities" that benefited from the program, the Sixth Circuit held that the program did not have the purpose of advancing religion.[155]

Third, the Sixth Circuit held that the program did not have the primary effect of advancing religion.[156] The Sixth Circuit provided several justifications for this conclusion: the program did not "[employ] skewed selection criteria . . . [to] stack the deck in favor of" religious groups;[157] in light of the array of entities that benefited from the program and the program's religion-neutral criteria, "[no] reasonable, reasonably informed observer" would conclude that the program promoted religious indoctrination;[158] the benefit offered was not "inherently religious content" but rather monetary grants for property renovations;[159] the benefit that the churches actually received—"cosmetic repairs to walls, doors, awnings and parking lots, as well as limited landscaping"—could not be converted to some religious purpose because "a brick, gutter or bush (unless burning) cannot be coopted to convey a religious message";[160] and the program, which involved an agency's review and approval of projects benefiting churches, did not amount to excessive government entanglement in religion.[161] Therefore, the Sixth Circuit held that the program did not violate the Establishment Clause.[162]

Even though *American Atheists* focuses on the Establishment Clause, instead of the Free Exercise Clause, it is pertinent to *Trinity* for at least two key reasons. First, it illustrates the scrutiny that a government benefit program must survive in order to satisfy the

154. *Id.*
155. *Id.* at 291.
156. *Id.*
157. *Id.*
158. *Id.* at 292.
159. *Id.* In fact, the Sixth Circuit reversed the district court's invalidation of funding granted to the churches to renovate signs and storm windows covering stained-glass iconography, holding that funding for these purposes was not improper because the signs and the storm windows did not have "religious content." *Id.* at 293. Referring to the renovation of the storm windows, the Sixth Circuit explained that replacing the storm windows over the stained-glass "did not transform the content-free storm windows into religious artifacts any more than removing plywood covering the windows would have made the wood a religious symbol." *Id.* This reasoning suggests that if the signs or storm windows contained religious content, then funding for repairing them might have been an unconstitutional promotion of a particular religious message.
160. *Id.*
161. *Id.* at 294. This form of Establishment Clause reasoning is not limited to the Sixth Circuit. *See* Barnes-Wallace v. City of San Diego, 704 F.3d 1067, 1082–84 (9th Cir. 2012) (discussing the constitutionality of leasing public land to a religious organization).
162. *Am. Atheists*, 567 F.3d at 282.

Establishment Clause. This analysis does not appear in *Trinity* because the parties agreed that the Establishment Clause would not have prohibited Missouri from including churches in the Program.[163] Justice Sotomayor criticized the Court's inattention to Establishment Clause issues[164] and began her *Trinity* dissent by arguing that the inclusion of the Center in the Program would have been unconstitutional.[165]

However, application of the Sixth Circuit's comprehensive test to scrutinize Missouri's Program affirms what the *Trinity* parties conceded—inclusion of the Center would not have violated the Establishment Clause. First, if the Program would have extended grants to churches, then it would have been neutral as to religion. In reality, Missouri ultimately awarded fourteen grants but none benefitted a church.[166] Thus, Missouri's exclusion of churches, rather than its inclusion, threatened the program's neutrality. Second, if the Program would have extended grants to churches, there would still be no evidence that Missouri instituted the Program for the purpose of advancing religion. What the record shows instead is that Missouri instituted the program "to reduce the number of used tires destined for landfills and dump sites."[167]

Third, if the Program would have extended grants to churches, the Program still would not have had the primary effect of advancing religion. The Department did not employ skewed selection criteria that would have favored religious groups; instead, it awarded grants on a competitive basis, prioritizing concerns such as "the poverty level of the population in the surrounding area [of the applicant] and the applicant's plan to promote recycling."[168] Additionally, no reasonable, informed observer would have concluded that the Program promoted religious indoctrination. In 2012, the Center would have been the only church to receive a grant, and the benefit would have been reimbursement for purchasing tire shreds used to resurface a playground.[169] Likewise, a reasonable observer would not have

163. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017).

164. *Id.* at 2028 (Sotomayor, J., dissenting) ("Constitutional questions are decided by this Court, not the parties' concessions.").

165. *Id.* at 2029.

166. *Trinity*, 137 S. Ct. at 2018 (Roberts, J.).

167. *Id.* at 2017.

168. *Id.*

169. *Id.* at 2018. Justice Sotomayor argued that it is "inescapable" that the Center's use of state funds to improve its playground surface "would impermissibly advance religion." *Id.* at 2029 (Sotomayor, J., dissenting). Justice Sotomayor overestimates the religious indoctrination that happens when rubberized tire shreds are poured beneath slides and swings. It seems more likely that a reasonable observer would conclude that the Program, even if it benefited the Center, still would not have the *primary* effect of advancing religion. Certainly, a reasonable observer would conclude that the Program

considered the benefit—monetary reimbursement for purchasing tire scraps—to be inherently religious content. Similarly, the tire shreds could not have been used for a religious purpose. Like a brick, gutter, or bush, a playground surface cannot be coopted to convey a religious message. Finally, if the Program would have extended grants to churches, it would not have involved government entanglement in religion greater than that involved in *American Atheists*.[170] Thus, by including the Center in the Program, Missouri would not have violated the Establishment Clause.

American Atheists is also pertinent to *Trinity* for what it explains about government benefits and discrimination on the basis of religious identity. In its analysis of whether the Authority's Program had the primary effect of advancing religion, the Sixth Circuit compared the revitalization grants to other permissible government benefits, emphasizing that a city "may extend sewers and sidewalks to churches, synagogues and mosques," and it may "provide police and fire-protection services to them."[171] "[The] Court has long approved the extension of these general government benefits to religious entities,"[172] the Sixth Circuit explained, even though these benefits, which allow religious institutions to save money, might "make it more likely that newcomers will attend their religious services."[173] Thus, the Sixth Circuit reasoned that it would be inconsistent, perhaps even unconstitutional, if Detroit could "save the exterior of a church from a fire" by deploying fire-protection services, but it could not "help that same church with peeling paint or tuckpointing—at least when it provides the same benefit to all downtown buildings on the same terms."[174]

Similarly, the Sixth Circuit noted that "[it] would be strange to read the Religion Clauses to say that churches may be subjected to neutral and generally applicable laws," such as Detroit's public health and safety regulations, "but may not receive neutral and generally applicable benefits," such as the revitalization grants.[175] Foreshadowing *Trinity*, the Sixth Circuit concluded that although the Constitution might not have compelled the Authority "to include religious groups in this downtown-revitalization project . . . but neither did it prohibit Detroit from including these groups in the project—either to enhance the success of the program (by revitalizing

would have the primary effect of recycling old tires or softening a playground surface.

170. Am. Atheists v. City of Detroit Downtown Dev. Auth., 567 F.3d 278, 282, 302 (6th Cir. 2009).

171. *Id.* at 291.

172. *Id.* at 292.

173. *Id.* at 291–92.

174. *Id.* at 292.

175. *Id.* at 300.

all of downtown) or to avoid sending a message of hostility to people of faith."[176]

After *Trinity*, the Court would likely affirm the Sixth Circuit's *American Atheists* decision. Based on the facts of the case, and the public health and safety features of the benefit at issue, the Constitution would have prohibited Detroit from excluding the churches on the basis of their religious identities.

B. Generating Tourism Dollars

Ark Encounter v. Parkinson,[177] a federal district court decision, also highlights the complexity of free exercise cases and shows *Trinity*'s reasonable position within the broader judicial landscape. In *Ark Encounter*, under the Kentucky Tourism Development Act ("KTDA"), the Commonwealth of Kentucky established a program to create new jobs and increase tax revenue by supporting successful tourist attractions.[178] Qualifying tourist attractions could apply for and receive tax incentives.[179] Generally, in order to qualify, an applicant had to demonstrate that its attraction would exceed a certain cost requirement, be open to the public, and attract twenty-five percent of its visitors "from . . . outside the Commonwealth."[180] Museums, amusement parks, and bourbon distilleries qualified for the program.[181]

The plaintiffs, collectively referred to as "AiG,"[182] planned to open a Noah's Ark theme park in Kentucky "because of the unique incentives for tourist attractions Kentucky offered."[183] AiG previously developed a popular tourist attraction in Kentucky, a Creation Museum; its new theme park would promote AiG's mission of "proclaiming biblical authority and the Gospel of Jesus Christ."[184]

AiG's representatives coordinated with Kentucky officials to ensure that the explicitly Christian theme park would qualify for the KTDA tax incentives.[185] Kentucky officials approved AiG's first application, and during a press conference the Governor declared that support for the project "did not raise any constitutional issues."[186]

The economic downturn delayed the project, and AiG had to reapply for the KTDA tax incentives.[187] This time, after a long

176. *Id.* at 292.
177. 152 F. Supp. 3d 880 (E.D. Ky. 2016).
178. *Id.* at 888.
179. *Id.* at 893.
180. *Id.*
181. *Id.* at 888.
182. "AiG" stands for "Answers in Genesis, Inc." and represents a group of faith-based companies involved in the Noah's Ark theme park. *Id.* at 888 n.2.
183. *Id.* at 888.
184. *Id.*
185. *Id.* at 889.
186. *Id.*
187. *Id.* at 890.

dispute, Kentucky rejected AiG's application, claiming that granting the tax incentives would violate the Commonwealth's constitutional prohibition of the use of tax revenues for the advancement of religion.[188] AiG filed suit against the Commonwealth, alleging that the denial of its application violated the First Amendment.[189]

The federal district court agreed with AiG.[190] Relying on the Sixth Circuit's reasoning in *American Atheists*, the court rejected the Commonwealth's Establishment Clause concern.[191] The court held that inclusion of AiG in the KTDA would not violate the Establishment Clause because the tax incentive program "has a secular legislative purpose," and AiG's involvement would not be an "endorsement of religion," have the "primary effect of advancing religion," or involve an "excessive entanglement" of government in religion.[192] In fact, the court concluded that "excluding AiG from the program because of its religious belief violates the crucial First Amendment principle of neutrality."[193]

Next, the court turned to AiG's free exercise claim.[194] The court weighed three factors to determine whether the Commonwealth's action violated AiG's free exercise rights: "(1) 'the magnitude of the burden on [AiG's] exercise of religion'; (2) 'the exercise of a compelling state interest justifying the burden'; and (3) 'the extent to which accommodation of [AiG] would impede the state's objective.'"[195]

The court found a substantial burden on AiG's free exercise rights.[196] Relying on the Supreme Court's reasoning in *Sherbert*,[197] the court explained that by rejecting AiG's application, Kentucky "has forced AiG to choose between expressing its religious views on its own property at the theme park and receiving the tax rebate under the KTDA."[198] "In this case," the court concluded, "the Commonwealth is funding the private secular programs while discriminating against the religious one because of its religiosity, which is a violation of the Free Exercise Clause."[199]

188. *Id.* at 892.
189. *Id.* at 893.
190. *Id.* at 908.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* In addition to holding that the rejection violated AiG's free exercise rights, the court held that the rejection violated AiG's free speech rights as "unconstitutional viewpoint discrimination." *Id.* at 911. A full discussion of this fascinating outcome is beyond the scope of this Comment.
195. *Id.* at 909 (quoting S. Ridge Baptist Church v. Indus. Comm'n of Ohio, 911 F.2d 1203, 1206 (6th Cir. 1990)).
196. *Id.* at 910.
197. *Id.*
198. *Id.*
199. *Id.*

The court also found that the Commonwealth did not have a compelling state interest to justify its burden.[200] "[A]llowing AiG to participate in a tax incentive program with a secular purpose and based on objective criteria will not violate the Establishment Clause," the court concluded.[201]

Finally, the court found that including AiG in the KTDA would not impede the Commonwealth's objectives for the program.[202] Since KTDA's goals were to promote tourism, create jobs, and increase tax revenues, and AiG's project would likely be a popular tourist attraction, "[i]ronically, such goals would best be met by allowing AiG's participation in the program," the court noted.[203]

Weighing these three factors, the court held that "the Commonwealth's pressure for AiG to give up its religious beliefs, purpose, or practice in order to receive a government benefit and gain acceptance into a government program impermissibly burdens AiG's free exercise of religion."[204]

Ark Encounter foreshadows the Free Exercise Clause analysis in *Trinity*, but it also extends the Sixth Circuit's reasoning in *American Atheists* to a government benefit that does not have clear public health and safety features. A reviewing court following *Trinity* might affirm this result and find that Kentucky improperly discriminated on the basis of AiG's religious identity.

More importantly, however, *Ark Encounter*, in light of *Trinity*, reveals the importance of defining the government benefit at issue, especially as religious groups continue to engage in activities that are not essentially religious endeavors—such as operation of a theme park, thrift store, coffee shop, preschool, daycare, or playground. Not only did the *Ark Encounter* court find that Kentucky's tax incentive program had a secular legislative purpose,[205] it found implicitly—applying language similar to *Trinity*'s—that tax incentives for the operation of a theme park—especially a theme park that will generate tourism revenue, even if it is composed of people compelled by their religious identity—does not amount to support of an essentially religious endeavor.[206] Thus, future *Trinity* cases will hinge on how the reviewing court (1) defines the government benefit at issue and (2) determines whether or not the funding at issue amounts to support of an essentially religious endeavor.

200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* at 910–11.
204. *Id.* at 911.
205. *Id.* at 898.
206. *Id.* at 898–99.

V. WHEN RELIGIOUS ORGANIZATIONS PROVIDE A PUBLIC SERVICE

This Part returns to the case filed against FEMA.[207] FEMA's Public Assistance Program's mission is to provide aid "so that communities can quickly respond to and recover from major disasters or emergencies declared by the President."[208] This FEMA program "provides supplemental Federal disaster grant assistance for debris removal, emergency protective measures, and the restoration of disaster-damaged, publicly owned facilities and the facilities of certain [private nonprofit] organizations."[209] In order for a private nonprofit organization to receive funding, its facility must provide public services.[210]

The District Court for the Southern District of Texas denied the churches' request for a preliminary injunction against FEMA.[211] The court found that *Locke*, not *Trinity*, controlled because the "Plaintiffs' potential funding was denied based on use rather than their status as churches."[212] FEMA's policy distinguished between facilities predominately used for religious purposes and facilities predominately used for public services.[213] Thus, the court reasoned that the churches were denied funds because they would use them to "repair church facilities" primarily used for "providing religious activities," and "the government has a historical and justifiable interest in avoiding an establishment of religion and using public funds to support religion."[214]

However, in January 2018, FEMA amended its policy and allowed churches devastated by Hurricane Harvey to apply for funding.[215] Subsequently, the Fifth Circuit vacated the district court's ruling and dismissed the churches' appeal.[216] Thus, the constitutional issue remains unaddressed.

First, the district court's ruling seems to ignore a range of government benefit programs that restore and preserve church

207. Complaint, *supra* note 3.

208. FEMA, PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE 7 (2018), https://www.fema.gov/media-library-data/1515614675577-be7fd5e0cac814441c313882924c5c0a/PAPPG_V3_508_FINAL.pdf.

209. *Id.*

210. *Id.* at 12.

211. Harvest Family Church v. FEMA, C.A. H–17–2662, 2017 WL 6060107, at *5 (S.D. Tex. Dec. 7, 2017).

212. *Id.*

213. Kate Shellnutt, *FEMA: Churches Flooded by Harvey Can Receive Aid*, CHRISTIANITY TODAY (Jan. 2, 2018, 7:25 PM), http://www.christianitytoday.com/news/2018/january/new-fema-policy-allows-aid-churches-flooded-harvey-houston.html.

214. *Harvest Family Church*, 2017 WL 6060107, at *4.

215. Shellnutt, *supra* note 213.

216. Harvest Family Church v. FEMA, No. 17–20768, 2018 WL 386192, at *1 (5th Cir. Jan. 10, 2018).

property.[217] While the Constitution prohibits using public funds to build churches,[218] it does not categorically prohibit the use of government funding to clean up or renovate property owned by houses of worship or other religious organizations.[219]

217. *See* 54 U.S.C. § 302905 (2018) (permitting historical preservation grants "for the preservation, stabilization, restoration, or rehabilitation" of certain religious property so long as the purpose of such a grant does not violate the Establishment Clause); Am. Atheists v. City of Detroit Downtown Dev. Auth., 567 F.3d 278, 299–300 (6th Cir. 2009) ("If the Establishment Clause excludes all religious institutions from programs that support their physical buildings, . . . [then] the government could not preserve a number of national landmarks . . . which benefit from direct federal aid . . . ."); Brief of Petitioners-Appellants at 53–54, *Harvest Family Church*, No. 17–20768 (5th Cir. Jan. 3, 2018) (stating that "houses of worship nationwide received hundreds of thousands of dollars from the federal government to preserve their sanctuaries under the National Park Service's Save America's Treasures program"); Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church, 27 Op. O.L.C. 91, 91 (2003) ("[W]e conclude that the Establishment Clause does not bar the award of historic preservation grants to the Old North Church or other active houses of worship that qualify for such assistance, and that the section of the National Historic Preservation Act that authorized the provision of historic preservation assistance to religious properties is constitutional."); Ira C. Lupu & Robert W. Tuttle, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, 43 B.C. L. REV. 1139, 1162–65 (2002) (surveying cases where church properties received federal grant money). For a similar discussion of the historical preservation of land used for religious purposes, see Rayellen Res., Inc. v. N.M. Cultural Props. Review Comm., 319 P.3d 639, 656 (N.M. 2014). *But see* Freedom From Religion Found. v. Morris Cty. Bd. of Chosen Freeholders, 232 N.J. 543, 547, 181 A.3d 992, 994 (2018) (holding that historic preservation grants extended to churches through Morris County's program violated the Religious Aid Clause of the New Jersey Constitution and that *Trinity* would not require including religious institutions in the historic preservation program), *cert. denied*, No. 18-364, No. 18-365, 2019 WL 1005843 (U.S. Mar. 4, 2019). Concerning the Court's denial of certiorari in this case and in a partnering case, Justice Kavanaugh issued a statement, joined by Justice Alito and Justice Gorsuch, clarifying his support for the denial. Morris Cty. Bd. of Chosen Freeholders v. Freedom From Religion Foundation, No. 18-364, No. 18-365, 2019 WL 1005843, at *1 (U.S. Mar. 4, 2019). In this statement, Justice Kavanaugh explained that the denial was "appropriate" because (1) "the factual details of the Morris County program are not entirely clear" and (2) "there is not yet a robust post-*Trinity Lutheran* body of case law in the lower courts on the question whether governments may exclude religious organizations from general historic preservation grants programs." *Id.* at *2. Furthermore, he emphasized that "a denial of certiorari does not imply agreement or disagreement with the decision of the relevant . . . state supreme court." *Id.* at *3. Most importantly, he concluded that "prohibiting historic preservation grants to religious organizations simply because the organizations are religious would raise serious questions under this Court's precedents and the Constitution's fundamental guarantee of equality." *Id.*

218. *See* U.S. CONST. amend. I.

219. *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017) ("The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its

Second, this case demonstrates the importance of (1) defining the public benefit and (2) determining whether or not the funding at issue amounts to support of an essentially religious endeavor. The district court defined the public benefit narrowly—the grant is funding to rebuild a church, and FEMA simply prohibited this particular use.[220] In fact, under its original policy, FEMA actually permitted religious organizations to apply so long as an applicant's facility offered a public service.[221] But FEMA's original position ignored reality: "Faith-based organizations, including churches, synagogues, and mosques, provide an extraordinary amount of support during natural disaster."[222] For example, Hi-Way Tabernacle, one of the petitioners, "served as an emergency staging area for government relief efforts . . . providing shelter for evacuees, emergency meals for families, and storage for food, water, clothing, and hygiene products."[223] Therefore, in some cases, church facilities provide the public services that FEMA purports to assist through its program. In other words, FEMA's goal—restoring facilities that provide a public service during and after a major disaster or emergency—would best be met by allowing houses of worship that provide such services to participate in the program. Thus, defining the public benefit as funding to repair facilities that are vital to disaster relief reveals how *Trinity* might control the case and support the churches' argument that FEMA's policy violated the Free Exercise Clause.[224]

Furthermore, the provision of public services in this context, even if it is provided by an organization compelled by its religious identity, is not necessarily an essentially religious endeavor. In light of Justice Breyer's concurrence in *Trinity*,[225] this framing is not unreasonable. If the holding in *Trinity* extends to public welfare legislation such as a benefit "designed to secure or to improve the health and safety of

religious character. Under our precedents, that goes too far. The Department's policy violates the Free Exercise Clause.").

220. Harvest Fam. Church v. FEMA, CV H-17-2662, 2017 WL 6060107, at *4 (S.D. Tex. Dec. 7, 2017).

221. Shellnutt, *supra* note 213.

222. Green, *supra* note 5. *See also* Paul Singer, *Faith Groups Provide the Bulk of Disaster Recovery, in Coordination with FEMA*, RELIGION NEWS SERV. (Sept. 11, 2017), https://religionnews.com/2017/09/11/faith-groups-provide-the-bulk-of-disaster-recovery-in-coordination-with-fema/ (quoting Greg Forrester, CEO of National Voluntary Organizations Active in Disaster, who stated, "[a]bout 80 percent of all [disaster] recovery happens because of nonprofits, and the majority of them are faith-based").

223. Green, *supra* note 5.

224. *See* Laycock, *supra* note 33, at 162 (describing the suit against FEMA as one of the "few cases in which clearly religious uses fall within a neutral secular category," meaning that "disaster-relief funds for churches" are the same as the benefit at issue in *Trinity*).

225. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2027 (2017) (Breyer, J., concurring) ("Here, the State would cut Trinity Lutheran off from participation in a general program designed to secure or to improve the health and safety of children.").

children,"[226] then it extends to a benefit designed to secure the health and safety of people effected by natural disasters, especially when it supports facilities that are vital to the relief effort.[227] *Trinity* does not mean that FEMA must provide relief grants to all houses of worship or that any grant recipient has a constitutional right to use a grant to promote a particular religious message, such as through the reconstruction of pulpits, altars, or stained-glass windows displaying religious images.[228] *Trinity* means that FEMA cannot categorically prohibit houses of worship, especially those providing public services after natural disasters or emergencies, from participating in the grant program alongside other groups simply on the basis of their religious identities. This is especially true if houses of worship were limited to using the funding for purposes that would not promote a particular religious message, such as removing dangerous debris, pumping out flood water, or securing damaged walls. In this context, *Trinity* means that discrimination based on religious identity is odious to the Constitution.

VI. CONCLUSION

Despite its criticism, *Trinity* is consistent with history and precedent. The "wall of separation" between church and state still stands. Perhaps it is more firmly set in its foundation—a foundation built upon government neutrality toward religion.

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226. *Id.*

227. In other words, if FEMA's funding promotes public safety, then it is similar to fire-protection services—but only after the fact. Following the Sixth Circuit's reasoning in *American Atheists*, it would be inconsistent, perhaps even unconstitutional, if the government could "save the exterior of a church from a fire," but it could not "help that same church with . . . [repairs]—at least when it provides the same benefit to . . . [other] buildings on the same terms." Am. Atheists v. City of Detroit Downtown Dev. Auth., 567 F.3d 278, 292 (6th Cir. 2009). *See also* Green, *supra* note 5 ("Nobody thinks it's unconstitutional for a fire truck to put out a fire at a church, and clearly there aren't different Establishment Clause rules for fires and floods. But are there different rules for putting out fires and repairing a build after it burns?") (quoting Richard Garnett).

228. *See supra* note 159 and accompanying text.

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